IN THE SUPREME COURT OF OHIO

JEFFREY B. SATURDAY and KAREN R. SATURDAY Plaintiff-Appellant, vs. CITY OF CLEVELAND BOARD OF REVIEW, and NASSIM M. LYNCH Defendants-Appellees.	)	Case No: 2014-0292 On Appeal from the Ohio Board of Tax Appeals Ohio Board of Tax Appeals Case No. 2011-4027

APPELLEES' MOTION TO STAY JUDGMENT MANDATE
PENDING APPEAL TO THE UNITED STATES SUPREME COURT

Barbara A. Langhenry (0038838)
Director of Law
Linda L. Bickerstaff (0052101) (COUNSEL OF RECORD)
Assistant Director of Law
City of Cleveland Department of Law
205 W. St. Clair Avenue
Cleveland, Ohio 44113
(216) 664-4406
(216) 420-8299 (facsimile)
lbickerstaff@city.cleveland.oh.us

COUNSEL FOR APPELLEES,
CITY OF CLEVELAND BOARD OF REVIEW
AND NASSIM M. LYNCH

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Pursuant to S.Ct.Prac.R. 4.01(A), Appellees request an order staying this Court's judgment mandate issued on July 8, 2015, pending the timely filing of a petition for a writ of certiorari with the United States Supreme Court and a decision on said petition by the Court. Appellees' request for a stay is properly before this Court since only this Court has issued a judgment against them.

This case is on appeal from a decision of the Board of Tax Appeals (BTA) where Taxpayer raised the exact same arguments as to the reasonableness and constitutionality of the games-played method as the taxpayer in *Hillenmeyer v. Cleveland Bd. of Review*, Case No. 2014-0235 and further claimed that because he did not travel with his team to Cleveland for the Cleveland game, he cannot be subject to city tax since not only is physical presence required to levy an income tax for due process purposes but on game day, he performed other services for his employer outside the City. The Court reversed the BTA's decision on April 30, 2015 finding that it is "only when a player [is] actually present at the game and earning compensation for his presence at that game" can he be taxed and that "Saturday's absence from Cleveland and his performance of duties elsewhere on the same day [as game day] raise a strong suggestion that the imposition of Cleveland tax would constitute extraterritorial taxation" (see attached). The Court remanded the matter back to the BTA with instructions that Taxpayers be granted a full refund of Cleveland income tax paid for 2008, along with interest that is proper pursuant to statute, city charter, or local ordinance. Cleveland timely filed a motion for reconsideration which this Court denied on July 8, 2015.

Like in *Hillenmeyer*, this Court's finding that Cleveland's taxation under its games-played method "would constitute extraterritorial taxation" raises a question of federal law that has widespread implications since for due process purposes, an apportionment method need not be based on time or days. This Court's finding too that due process requires physical presence to levy an income tax is likewise an issue of widespread significance since for almost 100 years beginning with *Shaffer v. Carter*, 2522 U.S. 237 (1920), the United States Supreme Court has consistently held that so long as the income is derived from an in-state source, jurisdiction to tax exists for due process purposes without physical presence. No one can dispute the national importance of these issues.

Appellees here are entitled to a stay of this Court's judgment mandate as a matter of right under both Ohio case authority and Ohio statutory authority.

A. Case Authority Holds Appellees Entitled To A Stay As A Matter Of Right.

Under Civ.R. 62(B) and (C), Cleveland is entitled to a stay of the judgment mandate as a matter of right. Civ.R. 62(B) and (C) provide, in pertinent part, as follows:

> (B) Stay upon appeal.
>
> When an appeal is taken the appellant may obtain a stay of execution of a judgment or any proceedings to enforce a judgment by giving an adequate supersedeas bond. ***
>
> (C) Stay in favor of the government
>
> When an appeal is taken by this state or political subdivision or administrative agency of either, or by any officer thereof acting in his representative capacity and the operation or enforcement of the judgment is stayed, no bond, obligation or other security shall be required from the appellant.

In *State ex rel. Ocasek v. Riley*, 54 Ohio St.2d 488, 377 N.E.2d 792, this Court granted a writ of prohibition to prevent a trial court from proceeding with an evidentiary hearing and ancillary proceedings on the motion of several government officers for a stay pending their appeal in a civil case. Examining Civ.R. 62(B) and (C), this Court held that:

> Pursuant to [Civ.R. 62], defendants-appellants are entitled to a stay of the judgment as a matter of right. The lone requirement of Civ.R. 62(B) is the giving of an adequate supersedeas bond. Civ.R. 62(C) makes this requirement unnecessary in this case, and respondent has no discretion to deny the stay. Therefore, the evidentiary hearing on the stay and the related depositions are inappropriate proceedings.

54 Ohio St.2d at 490, 377 N.E.2d at 793.

This Court reaffirmed *Ocasek* in *State ex rel State Fire Marshal v. Curl*, 87 Ohio St.3d 568, 572, 2000-Ohio-248, 722 N.E.2d 73, where it again held that "the governmental entity appealing [a] civil judgment was entitled to a stay pending appeal as a matter of right without posting a supersedeas bond[.]" 87 Ohio St.3d at 572, 377 N.E.2d at 76. In *State Fire Marshal*, this Court explained that "[o]ur interpretation of Civ.R. 62(B) and (C) in *Ocasek* comports with the interpretation of the similarly worded Fed.R.Civ.P. 62(d) and (e) by the leading treatises and a majority of federal courts." *Id.* at 571, 722 N.E.2d at 76 (citations omitted).

Appellees are entitled to a stay as a matter of right pursuant to Civ.R. 62(B) and (C) based on this Court's holdings in *Ocasek* and *State Fire Marshal*.

B. Specific Statutory Authority Exist To Issue Stay As Well.

Under Ohio statutory law, an appeal taken by these Appellees clearly operates as a stay of execution. Revised Code 2505.09 provides, in pertinent part, as follows:

> *Except as provided* in section 2505.11 or 2505.12, or another section of the Revised Code or in applicable rules governing

> courts, an appeal does not operate as a stay of execution until a stay of execution has been obtained pursuant to the Rules of Appellate Procedure or in another applicable manner, and a supersedeas bond is executed by the appellant to the appellee, with sufficient sureties and in a sum that is not less than, if applicable, the cumulative total for all claims covered by the final order, judgment, or decree and interest involved[.] ***

R.C. 2505.09 (emphasis added). While Revised Code 2505.12 states, in relevant part, that:

> An appellant is not required to give a supersedeas bond in connection with any of the following:
>
> (A) An appeal by any of the following:
> ***
> (2) The state or any political subdivision of the state;
> (3) Any public officer of the state or of any of its political subdivisions who is suing or is sued solely in the public officer's representative capacity as that officer.

R.C. 2505.12. Clearly, under Ohio statutory law, an appeal taken by Appellees here, operates as a stay of execution with no need to give a supersedeas bond.

For the reasons herein, this Court should grant Appellees' motion to stay judgment mandate pending the timely filing of a petition for a writ of certiorari with the United States Supreme Court and a decision on said petition since this Court's own case authority holds that Appellees are entitled to a stay as a matter of right and specific statutory authority exists to issue the stay as well under R.C. 2505.09 and 2505.12.

Respectfully submitted,
Barbara A. Langhenry, Esq., #038838
Director of Law

/s/ Linda L. Bickerstaff
By: Linda L. Bickerstaff, Esq., #0052101
Assistant Director of Law
COUNSEL FOR APPELLEES,
CITY OF CLEVELAND BOARD OF REVIEW
AND NASSIM M. LYNCH

CERTIFICATE OF SERVICE

A copy of the foregoing Appellees' Motion To Stay Judgment Entry And Mandate Pending Appeal To The United States Supreme Court was served by regular U.S. mail on Appellants' counsel, Stephen W. Kidder, Esq,. Hemenway & Barnes LLP, 60 State Street, Boston, MA 02109-1899 and Richard C. Farrin, Esq., Zaino Hall & Farrin LLC, 41 South High Street – Suite 3600, Columbus, Ohio 43215 on this 5th day of August 2015.

/s/ Linda L. Bickerstaff
Linda L. Bickerstaff, Esq.
Assistant Director of Law

SATURDAY ET AL., APPELLANTS, *v.* CLEVELAND BOARD OF REVIEW ET AL., APPELLEES.

[Cite as *Saturday v. Cleveland Bd. of Rev.*, 142 Ohio St.3d 528, 2015-Ohio-1625.]

Taxation—Municipal income tax—City lacked authority to impose tax on nonresident professional athlete who did not accompany his team to the taxing jurisdiction and was working outside the city while his team played there—Statutes relating to taxation have no extraterritorial effect.

(No. 2014-0292—Submitted January 14, 2015—Decided April 30, 2015.)

APPEAL from the Board of Tax Appeals, No. 2011-4027.

PFEIFER, J.

{¶ 1} In this case, we determine whether a nonresident professional athlete who does not accompany his team to Ohio for a game in Cleveland must pay municipal income tax to Cleveland based on his team's appearance there. We hold that a professional athlete whose team plays a game in Cleveland but who remains in his home city participating in team-mandated activities is not liable for Cleveland municipal income tax.

Factual and Procedural Background

{¶ 2} Jeffrey B. Saturday is a retired professional football player. During the taxable year at issue, 2008, Saturday was a center employed by the Indianapolis Colts of the National Football League ("NFL"). During the 2008 season, the Colts played one game in Cleveland against the Browns. Because of an injury, Saturday neither played in nor attended the Cleveland game; instead, he spent the day in Indianapolis engaging in physical rehabilitation activities at the Colts' behest. (More than 72,000 other souls attended the Colts' dismal 10-6

victory over the Browns.) The Colts nevertheless withheld an amount of Cleveland municipal income tax from Saturday's 2008 compensation and paid it to the city. Saturday and his wife, Karen, who filed joint income-tax returns, contend that Cleveland had no authority to impose its tax on the income of a nonresident who did not work within Cleveland's city limits during the taxable year.

1. The Saturdays' Refund Claim

{¶ 3} On December 18, 2009, the Saturdays sought from the Central Collection Agency ("CCA"), Cleveland's tax administration authority, a total refund of all income tax withheld and remitted to the city of Cleveland for tax year 2008. (They had previously filed a Cleveland tax return for 2008 showing that all tax had been paid through withholding and that they were entitled to a small refund.)

{¶ 4} Out of reported total municipal wages of $3,577,561.11, the Colts attributed $178,878 (approximately 5 percent of Saturday's 2008 income) to Cleveland under CCA Regulation 8:02(E)(6), which sets forth a "games-played" method of computing a nonresident professional athlete's municipal income tax base. Under the games-played method, the city claims the right to tax the amount of a professional athlete's annual income that is proportionate to the share of the team's preseason, regular season, and postseason games that were played in Cleveland. *See* CCA Regulation 8:02(E)(6). For example, if a team played 20 games in a year and one of those games was in Cleveland, Cleveland would apply its tax to one twentieth, or 5 percent, of each player's annual income. In another case announced today, *Hillenmeyer v. Cleveland Bd. of Rev.*, ___ Ohio St.3d ___, 2015-Ohio-1623, ___ N.E.3d ___, this court declares that method of computing a nonresident professional athlete's income tax base unconstitutional. Although the Saturdays advance some arguments that parallel those presented in *Hillenmeyer*, we decide this case on other grounds.

{¶ 5} The Saturdays requested a refund of $3,594. Identifying an error in the computation of the withholding, the CCA refunded the Saturdays a total of $322. But in a final administrative ruling issued on January 25, 2011, the CCA denied the claim for a full refund. The Saturdays filed an appeal to the City of Cleveland Board of Review by letter dated February 23, 2011.

2. Board of Review

{¶ 6} The board of review held a hearing on June 24, 2011. There was no live testimony at the hearing. Instead, counsel for the Saturdays and counsel for the Cleveland tax administrator presented documentary exhibits and arguments. The hearing was followed up by briefs of the parties.

{¶ 7} On September 20, 2011, the board of review issued its decision upholding the denial of the Saturdays' claims. The board first rejected the tax administrator's defenses of waiver and res judicata that were based on the Saturdays' having received and accepted earlier partial refunds due to corrected mathematical calculations. Next, the board held that the Saturdays failed to prove that the games-played method of income allocation was unreasonable, placing particular emphasis on the lack of live witnesses and their reliance on affidavits and other documentation at the hearing. Finally, the board characterized Saturday's absence from the Cleveland game—and Cleveland—as a paid sick day, which it held Cleveland had the authority to tax because Cleveland's nonresident-professional-athlete regulation expressly applied the tax to games from which an athlete was excused due to "illness or injury." *See* CCA Regulation 8:02(E)(6).

3. Board of Tax Appeals

{¶ 8} The Saturdays appealed to the Board of Tax Appeals ("BTA") on November 17, 2011. The parties waived a hearing there and submitted the case on the record and the briefs.

{¶ 9} The BTA issued its decision on January 28, 2014, affirming the board of review's determination. BTA No. 2011-4027, 2014 WL 504226 (Jan. 28, 2014). The BTA first disposed of the challenge to the games-played method on the basis of its decision in the *Hillenmeyer* case. *Id.* at *2. Next, the BTA considered the significance of Saturday's absence from the Cleveland game in 2008. Finding applicable to Saturday's situation two passages of the CCA's nonresident-professional-athlete regulation—that the tax should be withheld with respect to "the entire amount of compensation earned for games that occur in" Cleveland and that the Cleveland allocation includes compensation for games the athlete "was excused from playing because of injury or illness," CCA Regulation 8:02(E)(6)—the BTA concluded, citing its *Hillenmeyer* decision, that Cleveland's municipal-income-tax ordinance and the nonresident-professional-athlete regulation do not operate in contravention of any state statute or Ohio case precedent and constitute a " 'valid exercise of the city's municipal power to tax.' " *Id.* at *2-3, quoting *Gesler v. Worthington Income Tax Bd. of Appeals*, 138 Ohio St.3d 76, 2013-Ohio-4986, 3 N.E.3d 1177, ¶ 22. According to the BTA, it possessed "no jurisdiction to determine the constitutionality or reasonableness of the ordinance, including its application to athletes absent from games due to injury or illness." *Id.* at *3. Thereafter, the Saturdays appealed to this court.

4. Evidence Regarding Saturday's Employment

{¶ 10} The evidence the Saturdays presented in this case strongly parallels that presented by Hillenmeyer in his case, with the difference that Thomas DePaso, associate general counsel to the NFL Players' Association and a former NFL player, testified by affidavit in the Saturdays' case rather than live at the board of review hearing. Just as the live testimony in *Hillenmeyer* referred to the NFL collective-bargaining agreement and the individual player contracts, so does DePaso's affidavit in this case. It discusses the phases of an NFL player's work year: the three-day mandatory mini-camp; the preseason training camp; the

regular season with its work week including meetings, practices, and games; and the postseason.

{¶ 11} Other evidence included the affidavits of both Jeffrey and Karen Saturday, the affidavit of the Colts' vice president of finance, Kurt Humphrey, and the affidavit of the Colts' head athletic trainer, Dave Hammer. In addition to supporting DePaso's testimony concerning the duties and compensation of Saturday as an NFL player, these affidavits establish that Saturday suffered an injury during the 2008 season that rendered him inactive for four games, including the Cleveland game that year. They also document Saturday's treatment plan for the injury through a log that is kept in the ordinary course of business. The log shows that Saturday underwent rehabilitation for calf and knee injuries on the weekend of November 29 and 30, 2008—the dates on which the Colts traveled to Cleveland and played the game there.

{¶ 12} DePaso stated in his affidavit that NFL teams require injured players to follow a rehabilitation program and that players are subject to fines for failing to attend scheduled appointments with team physicians or trainers or for "material failure to follow a rehabilitation program prescribed by a Club physician or trainer." Jeffrey Saturday's affidavit asserted that during the period of his 2008-season injury he "attended team meetings and performed physical rehabilitation," adding that "failure to perform these services to the Colts would have subjected me to fines." The Humphrey affidavit shows the travel manifest relating to the 2008 Cleveland game, a document kept in the ordinary course of business by the Colts; it shows which team members went to Cleveland for the game. Saturday was not with the Colts in Cleveland that weekend.

Law and Analysis

{¶ 13} Under their first proposition of law, the Saturdays argue that the "taxation of the wages of a nonresident employee who performed no work or services in Cleveland is contrary to the Cleveland Codified Ordinances and Ohio

Law." Cleveland counters by arguing that its municipal-income-tax ordinance authorizes the tax by applying it to "qualifying wages" that are "attributable to" Cleveland. *See* Cleveland Codified Ordinances 191.0501(b)(1). Further, Cleveland relies on the specific provisions of its regulation governing the ordinance's application to nonresident professional athletes, placing particular emphasis on the inclusion in the games-played ratio of "games the athlete * * * was excused from playing because of injury or illness." CCA Regulation 8:02(E)(6). We conclude that Cleveland's municipal-income-tax ordinance and its nonresident-professional-athlete regulation do not allow for the taxation of the Saturdays' 2008 income.

{¶ 14} Cleveland imposes a tax on "all qualifying wages, earned and/or received on and after January 1, 1967, by nonresidents of the City for work done or services performed or rendered within the City or attributable to the City." Cleveland Codified Ordinances 191.0501(b)(1). Certainly, none of Saturday's work was performed in Cleveland. Nor can his work on the day of the Cleveland game, or on any other day, be attributed to Cleveland, since the evidence shows that Saturday was in Indianapolis on game day, engaging in physical rehabilitation in preparation for future games.

{¶ 15} CCA Regulation 8:02(E)(6), which describes how the tax applies to nonresident professional athletes, contains two potentially significant passages. It reads:

> 6. Professional athletes.
>
> In the case of employees who are non-resident professional athletes, the deduction and withholding of personal service compensation shall attach to the *entire amount of compensation earned for games that occur in the taxing community.* In the case of a non-resident athlete not paid specifically for the game played

> in a taxing community, the following apportionment formula must be used:
>
> The compensation earned and subject to tax is the total income earned during the taxable year, including incentive payments, signing bonuses, reporting bonuses, incentive bonuses, roster bonuses and other extras, multiplied by a fraction, the numerator of which is the number of exhibition, regular season, and post-season games the athlete played (or was available to play for his team, as for example, with substitutes), *or was excused from playing because of injury or illness*, in the taxing community during the taxable year, and the denominator of which is the total number of exhibition, regular season, and post-season games which the athlete was obligated to play under contract or otherwise during the taxable year, *including games in which the athlete was excused from playing because of injury or illness*.

(Emphasis added.)

{¶ 16} First, the regulation extends the tax to the "entire amount of compensation earned for games that occur in the taxing community." Cleveland argues that NFL players are paid to play games and that Saturday's compensation related to the playing of the game in Cleveland even though Saturday was not present for it.

{¶ 17} But when the regulation is read in the context of the ordinance—"for work done or services performed or rendered within the City or attributable to the City"—and also in light of our holding in *Hillenmeyer* that players such as Saturday are compensated for activity other than playing games, then Cleveland's reading of the regulation becomes untenable. In *Hillenmeyer*, this court determines that the "duty-days" method of calculating the amount of income that

is subject to Cleveland municipal tax "properly includes as taxable income only that compensation earned in Cleveland by accounting for all the work for which an NFL player such as Hillenmeyer is paid, rather than merely the football games he plays each year." *Hillenmeyer*, ___ Ohio St.3d ___, 2015-Ohio-1623, ___ N.E.3d ___, at ¶ 49.

{¶ 18} Since NFL players are contractually employed to provide services to their employers from the beginning of the preseason through the end of the postseason, including mandatory mini-camps, the official preseason training camp, meetings, practice sessions, and all preseason, regular season, and postseason games, and since they are required to undergo rehabilitation for injuries, Saturday's service to his employer encompassed his rehabilitation activity outside Cleveland on the day of the Colts-Browns game in Cleveland in 2008. That is, Saturday was performing his job duties in Indianapolis on game day. It follows that the language of the regulation—that the "entire amount of compensation earned for games that occur in the taxing community" is susceptible to municipal tax—must be construed more narrowly under the present circumstances to permit the taxation of compensation only when the player was actually present at the Cleveland game and earning compensation for his presence at that game.

{¶ 19} The second potentially significant passage in the regulation is the part that describes the ratio for allocating income to Cleveland for tax purposes. Both in constructing the numerator and the denominator for the games-played calculation, the regulation includes games the athlete "was excused from playing because of injury or illness." Cleveland argues that because Saturday was "excused from playing" the Cleveland game, the tax applies to him under this provision.

{¶ 20} This argument is unavailing for the simple reason that nothing in the regulation addresses the additional significant fact of Saturday's complete

absence from the city of Cleveland at the time of the game (and at every other time during the year). Had Saturday traveled to Cleveland with the team and been "excused from playing," the language of the regulation might support imposing the tax. But here, Saturday was not even present at the game, and the regulation says nothing about what to do when the athlete is not even in the city where the game is being played. Thus, the regulation is at best ambiguous as to whether the tax is levied on Saturday.

{¶ 21} At least two canons of construction militate against Cleveland's expansive interpretation of the city's income-tax law, given that the record here shows not only that the taxpayer was not in Cleveland on game day but also that he was performing job duties in another city on that day. First, it is a central tenet of tax jurisprudence that "a statute that imposes a tax requires strict construction against the state, with any doubt resolved in favor of the taxpayer." *Columbia Gas Transm. Corp. v. Levin*, 117 Ohio St.3d 122, 2008-Ohio-511, 882 N.E.2d 400, ¶ 34, citing *Gulf Oil Corp. v. Kosydar*, 44 Ohio St.2d 208, 339 N.E.2d 820 (1975), paragraph one of the syllabus. *See also Bosher v. Euclid Income Tax Bd. of Rev.*, 99 Ohio St.3d 330, 2003-Ohio-3886, 792 N.E.2d 181, ¶ 14 (applying the same principle to municipal income tax). Second, Cleveland's interpretation violates the "implied condition of all statutes relating to taxation that they have no extraterritorial effect." *Schneider v. Laffoon*, 4 Ohio St.2d 89, 96, 212 N.E.2d 801 (1965). Quite simply, Saturday's absence from Cleveland and his performance of duties elsewhere on the same day raise a strong suggestion that the imposition of Cleveland tax would constitute extraterritorial taxation.

{¶ 22} Therefore, we hold that neither Cleveland's municipal-income-tax ordinance nor the regulation governing its application to nonresident professional athletes authorizes the imposition of tax on Saturday's income under the circumstances of this case. Because we dispose of this case by construing the ordinance and the regulation against Cleveland's position, we need not reach the

other statutory and constitutional issues raised by the Saturdays, nor do we need to address the arguments advanced by Cleveland as to why those other issues have been waived or are otherwise barred from our consideration.

Conclusion

{¶ 23} We hold that Cleveland lacked authority under its city ordinance and its regulations to impose a tax on Saturday's income, given that none of the services for which he was compensated were performed in Cleveland during 2008. Accordingly, we reverse the decision of the BTA. We also remand with the instruction that the Saturdays be granted a full refund of Cleveland municipal income tax paid for 2008, along with any amount of interest that is proper pursuant to statute, city charter, or local ordinance.

Judgment reversed
and cause remanded.

O'CONNOR, C.J., and O'DONNELL, LANZINGER, KENNEDY, FRENCH, and O'NEILL, JJ., concur.

Hemenway & Barnes, L.L.P., Stephen W. Kidder, and Ryan P. McManus; and Zaino, Hall & Farrin, L.L.C., and Richard C. Farrin, for appellants.

Barbara A. Langhenry, Cleveland Director of Law, and Linda L. Bickerstaff, Assistant Director of Law, for appellees.
